ILE COPY

Office-Supreme Court, U.S.
FILED
JUL 28 1964
JOHN F. DAVIS, CLERK

No. 244

In the Supreme Court of the United States

OCTOBER TERM, 1964

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington, D. C., 20530.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission,
Washington, D. C., 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 244

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

The issue in this case is whether the court of appeals correctly held that the denial of a motion to dismiss is not a final appealable order.

This proceeding was instituted by the Interstate Commerce Commission in the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to Section 222(b) of the Interstate Commerce Act, 49 U.S.C. 322(b), to enjoin the two petitioners from engaging in any interstate for-hire transportation by motor vehicle without first obtaining the requisite operating authority from the

Commission. Petitioners filed a motion to dismiss, alleging that Section 222(b) is unconstitutional insofar as it empowers the Interstate Commerce Commission to file a suit seeking to enjoin operations conducted in violation of the provisions of the Motor Carrier Act. The claim is that the provision is unconstitutional because it gives the Commission authority to initiate the injunctive proceeding without approval of the Attorney General and thus violates the doctrine of separation of powers. The motion to dismiss was denied by the district court and the court of appeals dismissed the appeal on the ground that the order of the district court was not a final appealable order (Pet. 1a).

It is clear that petitioners' argument is without merit. The denial of a motion to dismiss is not a final decision and is not appealable even if the question raised is a constitutional one. 28 U.S.C. 1291; *Catlin* v. *United States*, 324 U.S. 229, 236; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30-31.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

JULY 1964.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1964 739302 74